IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 6, 2006 Session

DIANE MAYES v. JAMCO-KW, LLC, d/b/a ANDY ON CALL

Direct Appeal from the Circuit Court for Hamblen County
No. 03-CV-316 Hon. Kendall Lawson, Circuit Judge

No. E2005-01425-COA-R3-CV - FILED FEBRUARY 28, 2006

The Trial Court refused to grant defendant's Tenn. R. Civ. P. Rule 60 Motion to Set Aside Judgment. On appeal, we reverse.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Reversed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Larry C. Vaughan, Knoxville, Tennessee, for appellant.

Mark A. Cowan, Morristown, Tennessee, for appellee.

OPINION

This action originated in Sessions Court of Hamblen County, and judgment was granted to the plaintiff for $2,000.00, plus attorney's fees, for breach of a contract by defendant.

Plaintiff appealed the Sessions judgment to Circuit Court, and the next entry in the record before us is a document entitled "Default Judgment" that was entered on February 9, 2005 in Circuit Court. The body of the Judgment states "The Court heard this matter on October 29, 2004. Since defendant failed to appear, plaintiff is awarded judgment for $10,000.00 based on her testimony. Costs are taxed to the defendant."

On March 11, 2005, defendant filed a Motion for Relief from Judgment Pursuant to

Rule 60, asking the Court to set aside the "Default Judgment." The defendant alleged that it never received any notice of a hearing on October 29, 2004, and that it never received notice of a "Default Judgment" being entered until early February, 2005, over 3 months after the trial. Defendant alleged that it had a meritorious defense to the claim.

Defendant attached an Affidavit of David L. Valone, its former counsel, who stated he never received a notice of the hearing date for October 29, 2004, and never agreed to that hearing date.

The Circuit Court held a hearing on May 9, 2005, and denied defendant's motion.[1] Defendant has appealed the Trial Court's denial of its Motion for Relief from Judgment Pursuant to Rule 60.

When reviewing the denial of a Tenn. R. Civ. P. 60 motion, this Court must apply the abuse of discretion standard. *McCracken v. Brentwood United Methodist Church*, 958 S.W.2d 792, 795 (Tenn. Ct. App.1997). Only when a trial court has " 'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining' " is the trial court found to have abused its discretion. *Bowers v. Gutterguard of Tennessee, Inc.*, 2003 WL 22994302 (Tenn. Ct. App. 2003). The parties on appeal have argued and cited cases relating to setting aside default judgments, and the rule relating thereto. This is simply not a default judgment in the traditional sense. The record indicates that the case was set at a "docket sounding" and was tried on the date then set. The record also shows that no notice was given to the defendant or its attorney.

We believe the rationale set forth by Chief Justice Brock in the Supreme Court Opinion of *Bryant v. Edwards*, 707 S.W.2d 868 (Tenn. 1986) controls. In that case no notice of the trial date was given to the defendant or his counsel, and the Court said at page 870:

> In fact, there is no evidence anywhere in the record that the defendant or his attorney was notified of the date set for the trial, despite the fact that Rule 40, Tennessee Rules of Civil Procedure, provides:
>
> > "The courts shall provide by rule for the setting of cases for trial (a) without request of the parties but upon notice to the parties, or (b) upon request of a party and notice to other parties. Precedence shall be given to actions entitled thereto by any statute of the state of Tennessee."
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> The Committee Comment to Rule 40 states that "the provisions of this Rule are directory only." Nevertheless, it is axiomatic that all parties to litigation are entitled

[1]At the hearing, plaintiff's counsel stated that the hearing date of October 29 was set at a docket sounding "which Mr. Valone chose not to attend."

> to receive notice of important hearings and other proceedings; due process requires it. The record before us is fatally deficient in this important respect. This being the case, we conclude that the trial court erred in denying defendant's timely motion for a new trial.

Citing, Campbell v. Archer, Tenn., 555 S.W.2d 110 (1977); *Reinshagen v. Larezzo*, 2 Tenn. Cas. (Shannon) 139 (1976).

However, plaintiff argues that the defendant did not raise a meritorious defense it its Motion, and relies on cases involving default judgments. As we have stated, these cases are inapposite to the case before us, and where there has been a denial of due process to a party as stated in *Bryant*, relief must be granted, otherwise the result would be in prejudice to the judicial process. Tenn. R. App. P. 36(b).

For the foregoing reasons, we reverse the Judgment of the Trial Court and reinstate the action for further proceedings in the Trial Court. The cost of appeal is assessed to Diane Mayes.

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HERSCHEL PICKENS FRANKS, P.J.